United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

To be Argued by
SAMUEL GOTTLIEB, ESQ.

74-2374

B
P/S

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

Docket No. 74-2374

PIETRO C. RUBINO, for himself and all other persons similarly situated, et al.,

Plaintiff-Appellant,

- against -

HARRY T. NUSBAUM,

Plaintiff-Intervenor-Appellant,

- against -

JOHN J. GHEZZI, et al.,

Defendants-Appellees.

BRIEF FOR PLAINTIFF-INTERVENOR-APPELLANT

UNITED STATES COURT OF APPEALS
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BRIEF FOR PLAINTIFF-INTERVENOR-APPELLANT

Statement

Plaintiff-Intervenor, a Judge of the Civil Court of the City of New York, was permitted to intervene by Judge GRIESA at the time the application below came on for hearing. Judge Nusbaum was elected on November 4, 1969 for a ten-year term, from January 1, 1970 to December 31, 1979. Having been born on August 10, 1908, he will be 70 years of age on August 10, 1978, so that he will be compelled to terminate his judicial service on December 31, 1978, prior to the expiration of the statutory judicial term of office for civil court judges.

Judge GRIESA immediately upon ascending the bench and before hearing argument voiced the conclusion that there was no substantial federal question presented. Brief argument nonetheless was had, at the conclusion of which Judge GRIESA placed his "bench decision" that had already been prepared on the record, denying the application for the convening of a three-judge court under 28 USC § 2281, holding that there is no "constitutional question which requires

a continuation of this action." (A21-7)* and determined that:

> "The application for convening a 3-judge court is denied and the action is dismissed." (A20)

Plaintiff-Intervenor likewise has appealed.

THE CONSTITUTIONAL CHALLENGE HERE PRESENTED

As the opinion below points out (A22), the relevant provisions are Article 6, § 25, subd. b of the New York State Constitution and § 23 of the New York Judiciary Law. It is provided in Article 6, § 25 of the New York State Constitution that:

> "b. Each judge of the court of appeals, justice of the supreme court, judge of the court of claims, judge of the county court, judge of the surrogate's court, judge of the family court, judge of a court for the city of New York established pursuant to section fifteen of this article and judge of the district court shall retire on the last day of December in the year in which he reaches the age of seventy. Each such former judge of the court of appeals and justice of the supreme court may thereafter perform the duties of a justice of the supreme court, with power to hear and determine actions and proceedings, provided, however, that it shall be certificated in the manner provided by law that the services of such judge or justice are necessary to expedite the business of the court and that he is mentally and physically

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* These references are to the Joint Appendix. All emphasis supplied, unless otherwise noted.

able and competent to perform the full duties of such office. Any such certification shall be valid for a term of two years and may be extended as provided by law for additional terms of two years. A retired judge or justice shall serve no longer than until the last day of December in the year in which he reaches the age of seventy-six. A retired judge or justice shall be subject to assignment by the appellate division of the supreme court of the judicial department of his residence. Any retired justice of the supreme court who had been designated to and served as a justice of any appellate division immediately preceding his reaching the age of seventy shall be eligible for designation by the governor as a temporary or additional justice of the appellate division. A retired judge or justice shall not be counted in determining the number of justices in a judicial district for purposes of section six subdivision d of this article.

c. The provisions of this section shall also be applicable to any judge or justice who has not reached the age of seventy-six and to whom it would otherwise have been applicable but for the fact that he reached the age of seventy and retired before the effective date of this article." (McKinney's Const., Art. 6, § 25 at p. 353)

The New York State Judiciary Law, § 23, provides:

"§ 23. Age limitation on term of judicial office

No person shall hold the office of judge, justice or surrogate of any court, whether of record or not of record, except a justice of the peace of a town or police justice of a village, longer than until and including the last day of

December next after he shall be seventy years of age, except that a judge or justice in office or elected or appointed to office at the effective date of this section, as to whom no provision limiting his right to hold office to the close of the year following his attaining the age of seventy years was applicable prior to the effective date of this section, may continue in office during the term for which he was elected or appointed." McKinney's Judiciary Law, § 23.

In the "bench decision" rendered below, it is stated:

"One specific argument should be dealt with, and that is an equal protection argument relating to a differentiation in treatment as to the Civil Court Judges versus certain other judges or justices of the state.

It is provided in the case of the Judges of the New York State Court of Appeals and Justices of the Supreme Court that these two types of judges may, following the age of 70, perform the duties of a Justice of the Supreme Court provided that it shall be certificated that the services of such Judges or Justices are necessary to expedite the business of the court, and that such persons are mentally and physically able and competent to perform the full duties of such office. Service under this provision may be made under the conditions specified until the individual reaches the age of 76." (A25)

The opinion continues:

"It seems to me perfectly clear that this is not a denial of equal protection. The

> legislature and the people of the State of New York in their Constitution and in their Judiciaty Law had a perfectly valid ground, without question, to make a minor differentiation between the two categories of judges and provide for a short additional service under certain circumstances for Court of Appeals Judges and Supreme Court Justices in the State Supreme Court." (A25-6)

After expressing the view that "[t]he differentiation in treatment does not in my view in any way raise a constitutional question" and that the "refusal to convene a three-judge court" in no way indicates any lack of sympathy with the position advanced by appellants (A26), Judge GRIESA concludes:

> "I know as well as anyone that men who have passed the age of 70 years can continue to perform all kinds of services, including services on the judiciary, and I know as well as anyone that blanket retirement rules can have their effects of imposing hardship in individual cases. But it is equally clear that it is my limited function to try to assess the existence or nonexistence of a valid question as to whether the New York provisions violate the Federal Constitution.
>
> I am not acting as a drafter of the New York Constitution or as a member of its legislature, and having in mind my limited role, I cannot conscientiously hold that there is any constitutional question which requires the continuation of this action and I am dismissing it." (A26-7)

This Court, by order dated October 30, 1974 granted the application in which we joined, for a preference and directed that the briefs "be filed in typewritten form," and that "appellant's brief and the joint appendex be filed on or before November 14, 1974; appellee's brief by December 13, 1974," and the appeal "to be heard during the week of January 6, 1975."

POINT I

THE CHALLENGE TO THE VALIDITY OF ARTICLE 6, § 25, SUBDIVISION b OF THE NEW YORK STATE CONSTITUTION AND § 23 OF THE NEW YORK JUDICIARY LAW IS OF CONSTITUTIONAL MAGNITUDE. THESE PROVISIONS, WHICH MANDATE THE TERMINATION OF THE JUDICIAL TENURE OF A JUDGE OF THE CIVIL COURT OF THE CITY OF NEW YORK ON DECEMBER 31 AFTER REACHING THE AGE OF SEVENTY, ARE VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE 14th AMENDMENT OF THE FEDERAL CONSTITUTION.

THE SUBSTANTIAL CONSTITUTIONAL QUESTION THUS RAISED MUST BE DETERMINED BY A STATUTORY THREE-JUDGE COURT (28 USC § 2281)

Appellant-Intervenor, as are all judges of the Civil Court of City of New York, was elected for a full term of ten years (McKinney's Constitutional Law, Art. 6, § 15, subd. a, Judiciary Law, § 176). A judge of the

Civil Court may be temporarily assigned to the supreme court in the judicial department of his residence (McKinney's Const., Art. 6, § 26, subd. g). Currently, as we understand it, twenty-seven Civil Court Judges, including Intervenor-Appellant Judge Nusbaum, have been assigned to the Supreme Court and of course, as this Court may take judicial notice, they perform all the duties incumbent upon a Supreme Court Justice.

As the opinion below indicates, under the New York State Constitution and Statute, Judges of the New York State Court of Appeals, Justices of the Supreme Court "may following the age of 70 perform the duties of a Justice of the Supreme Court provided that it shall be certificated that the services of such Judges or Justices are necessary to expedite the business of the Court, and that such persons are mentally and physically able and competent to perform the full duties of such office and that such judicial service may continue under the conditions specified until the individual reaches the age of 76." (A25). On the other hand, a Judge of the Civil Court such as Appellant-Intervenor, is not given the benefit of any such individualized determination, but is

met with the "irrebuttable presumption" that he is no longer fit and capable of continuing in judicial office after reaching the statutory age limitation of seventy years (A25-6; pp. 3-5, supra). In order to avoid unnecessary repetition, we focus attention here as indeed we did in the Court below upon the impact of Cleveland Bd. of Ed. v. LaFleur, 414 US 632, 39 L.Ed. 2d 52, Jan.1974, as recognized in Weisbrod v. Lynn, 494 F. 2d 1101, DC Cir., Mar. 1974, wherein it was held per curiam:

> "Appellant, a long time federal employee who was mandatorily retired at age 70 under the requirements of 5 USC § 8335, brought suit in the District Court seeking to enjoin the enforcement of that statute on the ground of its alleged inconstitutionality. He moved the District Court to convene a three-judge court under 28 USC §§ 2281 and 2284. The District Court denied that motion (and simultaneously dismissed the complaint) because it thought that the complaint raised no substantial constitutional issue; and the only question before us on this appeal is the correctness of that determination." (pp. 1101-2)
>
> The opinion continues:
>
> "The Supreme Court has made abundantly clear that a three-judge district court must be convened if the constitutional issues raised have a substantiality which takes them outside such characterizations as 'obviously without merit,' 'wholly insubstantial, [or] legally speaking nonexistent,'

> or unless 'unsoundness so clearly results from previous decisions of this Court as to foreclose the subject.' See California Water Service Co. v. City of Redding, 304 U.S. 252, 255, 58 S.Ct. 865, 867, 82 L.Ed. 1323 (1938), and Bailey v. Patterson, 369 U.S. 31, 33, 82 S. Ct. 549, 7 L.Ed.2d 512 (1962). In appellant's case, Cleveland Board of Education v. LaFleur, 414 U.S. 632, 657, 94 S.Ct. 791, 39 L.Ed.2d 52 (Rehnquist, J. dissenting) (decided January 21, 1974)- a decision which was not available to the District Court at the time of its ruling- is ample indication that appellant's challenge in this instance presents a constitutional issue of sufficient substance as to warrant consideration by a three-judge court." (p. 1102)

Accordingly, the Court reversed the order denying the motion to convene a three-judge court and granting a dismissal of the complaint; the case was "remanded to the District Court with instructions to convene a three-judge court." (p. 1102).

To paraphrase the language of the majority opinion in LaFleur, the mandatory termination provisions of Article 6, § 25, subd. b of the New York State Constitution and § 23 of the New York Judiciary Law operate to insulate the New York Civil Court Judges from the Supreme Court Justices who sit in the same court and perform the same judicial functions. With respect to the Supreme Court Justices, there is an

"individualized determination" made after reaching the age of seventy, whereby such judicial service may continue until the age of 76 if "it shall be certificated in the manner provided by law that the services of such judge or justice are necessary to expedite the business of the court and that he is mentally and physically able and competent to perform the full duties of such office." (Judiciary Law, § 23; p. 3, supra). As to Civil Court Judges who may be contemporaneously sitting in the same court, performing the same judicial duties, there is an "irrebuttable presumption" of judicial incapacity, and that presumption applies even if there was "medical evidence" that "might be wholly to the contrary" (LaFleur, 39 L.Ed. 2d at p. 62).

As the majority opinion points out in LaFleur, quoting Vlandis v. Kline, 412 US 441, 446, 37 L.Ed. 2d 63, "permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments." In Vlandis, the Supreme Court held that the Due Process Clause forbids the invocation of an irrebuttable presumption "when that presumption is not necessarily universally true in fact and when the

state has reasonable alternative means of making the crucial determination" (LaFleur, supra, 39 L.Ed. 2d at p. 63). In the instant case, it clearly appears from the New York State Constitution and Statute heretofore quoted, that the State has reasonable alternative means of making the crucial determination as to whether or not a Judge of the Civil Court is competent to continue his judicial functions after reaching the age of seventy by the very same procedure that is made available with respect to a Supreme Court Justice, namely by having it "certificated in the manner provided by law that the services of such judge or justice are necessary to expedite the business of the court and that he is mentally and physically able and competent to perform the full duties of such office."

We may note parenthetically that no question is here presented, nor raised, as to whether continuation of judicial tenure "was necessary to expedite the business of the court."

Again in the reasoning of the majority in LaFleur even assuming arguendo there are judges physically unable to work past the age of 70, it is certainly evident to this Court there are large numbers of judges fully

capable of continuing their judicial duties far longer than the New York State Constitution and statutory provisions here challenged will allow. Thus, and we continue the LaFleur terminology, "the conclusive presumption embodied" therein "is neither necessary nor universally true and is violative of the Due Process Clause" (LaFleur, supra, 39 L.Ed. at pp. 63-4).

Again in LaFleur terminology, it might be easier to conclusively presume that all Civil Court Judges are unfit to render judicial service past the age of 70, but convenience alone "is insufficient to make valid what otherwise is a violation of the Due Process Clause." That the judges here involved acquired their judicial status, through election to the New York Civil Court rather than to the New York Supreme Court, does not justify the mandatory termination of their tenure which so broadly infringes upon their constitutional rights. While the New York State Constitution and statutory mandatory termination requirements undoubtedly "represent a good faith attempt to achieve a laudable goal they cannot pass muster under the Due Process Clause of the Fourteenth Amendment", because they employ

the irrebuttable presumption that a New York Civil Court Judge on December 31 after he reaches the age of 70 is subject to instant obsolescence and can no longer competently render judicial service (LaFleur, supra, 39 L.Ed. at p. 64).

It is manifest that a Judge's election to the New York Civil Court rather than the New York Supreme Court can have nothing to do, to use the language of the New York State Constitution (pp. 3-4, supra) with whether "he is mentally and physically able and competent to perform the full duties" after attaining the age of 70. The age limitation here assailed we submit patently serves no valid state interest. The mandatory termination here questioned violates the Due Process Clause of the Fourteenth Amendment in the use of an unwarranted conclusive presumption as to the judges elected to the Civil Court of New York who but for the mandatory age limitation could continue their services in the New York Supreme Court under the procedure set up for "individualized determination" as to whether the judge "is mentally and physically able and competent to perform the full duties of that office "(pp.2-3, supra).

It is unnecessary specifically to name the many jurists who have served and are serving in this Court, the United States Supreme Court and for that matter in the New York State Supreme Court well past the age of 70 with competence and distinction in the full performance of heavy judicial responsibilities. They, and distinguished members of the Bar such as the Attorney General and the senior Senator of the State of New York who have just been elected to their high office after having attained the age of 70, under the provisions of the State Constitution and Statute here challenged, are conclusively presumed to be incapable of rendering judicial service in the Civil Court of the City of New York; so too would be the present Corporation Counsel of the City of New York, formerly a distinguished member of the New York Court of Appeals!

We need but add in conclusion, as we did on oral argument below, that the dissent of Mr. Justice Rehnquist in LaFleur buttresses our position that there is here presented a substantial federal question of constitutional magnitude. Mr. Justice Rehnquist in his dissent trenchantly observes:

"More closely in point is the jeopardy in which the Court's opinion places long-standing statutes providing for mandatory retirement of governmental employees. 5 USC § 8335 provides with respect to Civil Service employees:

> '(a) Except as otherwise provided by this section, an employee who becomes seventy years of age and completes fifteen years of service shall be automatically separated from the service...'" (39 L.Ed. 2d at p. 71)

The dissenting opinion continues:

"It was pointed out by my Brother Stewart only last year in his concurring opinion in Roe v. Wade, 410 US 113, 169, 35 L Ed 2d 147, 93 S Ct 705, 'The liberty protected by the Due Process Clause of the Fourteenth Amendment covers more than those freedoms explicitly named in the Bill of Rights. See ... Truax v. Raich, 239 US 33, 41 [60 L Ed 131, 36 S Ct 7].'

In Truax v. Raich, the Court said:

> 'It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure.' 239 US 33, 41, 60 L Ed 131, 36 S Ct 7.

Since this right to pursue an occupation is presumably on the same lofty footing as the right of choice in matters of family life, the Court will have to strain valiantly in order to avoid having today's opinion lead to the invalidation of mandatory retirement statutes for governmental employees. In that event federal, state and local governmental

> bodies will be remitted to the task, thankless both for them and for the employees involved, of individual determinations of physical impairment and senility." (39 L.Ed. 2d at p. 71)

The reason we stressed and quoted from the dissenting opinion of Mr. Justice Rehnquist is that it accurately reflects the current approach and philosophy of the Supreme Court in respect of the precise problems of the type here presented. We do not maintain that all statutory age specifications, classifications and limitations, any more than those for example based on sex, are constitutionally vulnerable. However, we submit, mandatory termination provisions such as are referred to in LaFleur and were struck down and those that exist here, are properly subject to challenge as to their constitutional validity.

28 USC § 2281 does not compel the convening of a three-judge court where the constitutional attack upon the State Constitution or Statute is insubstantial. But as noted in Goosby v. Osser, 409 US 512, 35 L.Ed. 2d 36:

> "'Constitutional insubstantiality' for this purpose has been equated with such concepts as 'essentially fictitious,' Bailey v. Patterson, 369 US, at 33, 7 L Ed 2d 512; 'wholly insubstantial,' ibid.; 'obviously frivolous,' Hannis

Distilling Co. v. Baltimore, 216 US 285, 288, 54 L Ed 482, 30 S Ct 326 (1910); and 'obviously without merit,' Ex parte Poresky, 290 US 30, 32, 78 L Ed 152, 54 S Ct 3 (1933). The limiting words 'wholly' and 'obviously' have cogent legal significance. In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 USC § 2281 [28 USCS § 2281]. A claim is insubstantial only if 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.' Ex parte Poresky, supra, at 32, 78 L Ed 152, quoting from Hannis Distilling Co. v. Baltimore, supra, at 288, 54 L Ed 482; see also Levering & Garriques Co. v. Morrin, 289 US 103, 105-106, 77 L Ed 1062, 53 S Ct 549 (1933); McGilvra v. Ross, 215 US 70, 80, 54 L Ed 95, 30 S Ct 27 (1909)." (p. 518)

Finally, as tersely stated in Nieves v. Oswald, 477 F.2d 1109, per FEINBERG, J.:

"In Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 715, 82 S.Ct. 1294, 8 L.Ed.2d 794 (1962)(per curiam), the Supreme Court stated that when an application for a three-judge court is addressed to a district judge, his inquiry is limited to determining (1) whether the constitutional question is substantial; (2) whether the complaint at least formally alleges a basis for equitable relief; and (3) whether the case otherwise comes within the requirements of the three-judge statute. If all criteria are established, the single judge

must convene a statutory three-judge court. See Abele v. Markle, 452 F.2d 1121, 1126 (2d Cir. 1971)." (pp. 1111-1112)

CONCLUSION

The order appealed from denying appellant's motion to convene a three-judge court and dismissing the complaint should be reversed and the case remanded to the District Court with instructions to convene a three-judge court.

Respectfully submitted,

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